FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-3967

MEAGAN SHELL VINCENT, Wife,

Petitioner,

v.

BRIAN JAMES VINCENT,
Husband,

Respondent.

Petition for Writ of Certiorari—Original Jurisdiction.

December 14, 2020

PER CURIAM.

DENIED. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995) (noting that the required "departure from the essential requirements of law" for certiorari relief "means something far beyond legal error"); *O'Neill v. O'Neill*, 823 So. 2d 837 (Fla. 5th DCA 2002); *Miraglia v. Miraglia*, 462 So. 2d 507 (Fla. 4th DCA 1984); *Critchlow v. Critchlow*, 347 So. 2d 453 (Fla. 3d DCA 1977).

BILBREY and WINOKUR, JJ., concur; TANENBAUM, J., concurs with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

TANENBAUM, J., concurring.

There is no miscarriage of justice here, so I concur in the denial of Ms. Vincent's petition. The record reflects that Ms. Vincent intentionally put her mental health condition at issue in this custody dispute with Mr. Vincent when she called her own counselor to testify as to her stability and impairment. And she conceded that the records at the heart of the present petition were relevant when she invited the trial court to consider the records—without any limitation—as part of its ultimate custody determination. There is no basis to quash the order, and I will address this point in a moment.

Let me begin, though, by stating my disagreement with the idea—reflected in the cases cited by the majority—that there can be some sort of "involuntary waiver" of the psychotherapist-patient privilege found in section 90.503 of the Florida Evidence Code. *See Zarzaur v. Zarzaur*, 213 So. 3d 1115, 1119 (Fla. 1st DCA 2017) (characterizing the "calamitous event" occurring in *O'Neill*, *Miraglia*, or *Critchlow* (*e.g.*, attempted suicide, voluntary commitment) as an "involuntary waiver" of the privilege).

The Florida Legislature grants a mental health patient the following privilege:

> [T]o refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis

made, and advice given, by the psychotherapist in the course of that relationship.

§ 90.503(2), Fla. Evid. Code.

This privilege, however, does not attach to "communications relevant to an issue of the mental or emotional condition of the patient in any proceeding in which the *patient relies* upon the condition as an element of his or her claim or defense." § 90.503(4)(c), Fla. Evid. Code (emphasis supplied). In the highlighted language, the Legislature established an exception based on an *intentional* decision by the patient about what claim or defense to prosecute. By way of contrast, the Legislature created two exceptions based on something other than the voluntary conduct of the patient. *Cf.* § 90.503(4)(a), Fla. Evid. Code (creating an exception for communications relevant to a proceeding to "*compel* hospitalization" (emphasis supplied)); § 90.503(4)(b), Fla. Evid. Code (creating an exception for communications "made in the course of a *court-ordered* examination of the mental or emotional condition of the patient" (emphasis supplied)).

This court in the past has stated that a parent does not put her mental health at issue, implicating the exception in paragraph (c), "merely by seeking child custody." *Leonard v. Leonard*, 673 So. 2d 97, 99 (Fla. 1st DCA 1996). Neither the allegations of mental instability by one spouse, nor denials of those allegations by the other spouse, are enough to trigger paragraph (c) and overcome the privilege. *Id.* "To hold otherwise would eviscerate the privilege; a party seeking privileged information would obtain it simply by alleging mental infirmity." *Id.* (quotation and citation omitted). Nevertheless, in each case cited by the majority, a district court curiously rewrites the Legislature's language in paragraph (c) so that the exception would apply where the patient's mental health is deemed to have become relevant despite the absence of a choice by the patient to raise that condition as an issue.

In *Critchlow* the mother agreed to the appointment of a psychiatrist to opine as to which parent should have custody, and she either stipulated to or failed to object to discovery from the doctors who provided her mental health treatment during her *voluntary* commitment. 347 So. 2d 453, 454 (Fla. 3d DCA 1977).

Based on those volitional steps taken by the mother in litigation, the court concluded that she waived her privilege. *Id.* In dicta, the court suggested that the "*voluntary* commitment for treatment of her mental condition" precluded invocation of the privilege because her mental health was "vital to a proper determination of permanent custody." *Id.* at 455 (emphasis supplied).

Courts in two other districts ran with this gratuitous—and unauthorized—redrafting of the privilege written by the Legislature. In *Miraglia* the court directed that the otherwise privileged testimony of a spouse's "long-time psychiatrist" be admitted in a custody dispute because her attempted suicide suddenly caused her mental health to be "vital to a proper determination of permanent custody." 462 So. 2d 507, 508 (Fla. 4th DCA 1984) (quoting *Critchlow*, 347 So. 2d at 455). In a later case, the same court read these two cases to mean that "in situations where calamitous events such as an attempted suicide occur during a pending custody dispute," the parent's mental health becomes "sufficiently at issue to warrant finding no statutory privilege exists." *In re D.K.*, 780 So. 2d 301, 309 (Fla. 4th DCA 2001). The Fifth District soon thereafter concluded in *O'Neill* that a mother's threatened suicide and *voluntary* commitment (that is, she sought mental health treatment of her own volition) was a "calamitous event" supporting "an implicit waiver" of the privilege as to the records produced during her commitment. 823 So. 2d 837, 840–41 (Fla. 5th DCA 2002).

There is no authority for this approach to the privilege. Courts cannot add or subtract from statutory language in their opinions and expect those opinions to be treated seriously as the law. Only the Legislature has the authority to make and modify policy for Florida. *See* Art. III, § 1, Fla. Const. (vesting all legislative power in the Legislature). A court's role is to apply such public policy as written, subject to any constitutional limitations. *See Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976) ("Clearly, the Legislature has the power to enact substantive law, and it is the duty of the courts to enforce such substantive law where constitutional.").

As I noted a few paragraphs earlier, in section 90.503, the Legislature expressly established two exceptions to the privilege that do not require an intentional choice of the patient. Those are

found in paragraphs (a) and (b), and neither applies in a case where the patient on her own seeks treatment. By contrast, paragraph (c) expressly applies only when the *patient*—and no one else—*as part of the litigation* puts her mental health condition at issue by affirmatively raising it as part of a claim or defense. That is, the privilege does not apply if the patient makes a conscious, tactical choice—intrinsic to the litigation—to put her mental health condition into dispute, making the facts of her condition fair game for the opposing party. *Critchlow*, *Miraglia*, and *O'Neill*, without any textual analysis, write this volitional component out of paragraph (c) to allow for application of this exception based on the parent's private decision regarding her mental health care, outside the context of (or extrinsic to) the litigation.

That is, by the reasoning of these cases, if the *court*, at the urging of the opposing party in litigation, determines that mental health records from the parent's own voluntary, confidential treatment would be relevant to the custody determination, then the *court* can order the divulgence of sensitive, deeply personal records, even without the parent making the conscious choice to make a claim or defense based on her mental health condition, as the text otherwise plainly requires. These cases gravely alter the privilege that the Legislature established. At their essence, the cases impermissibly eliminate the expectation of confidentiality that section 90.503 vouchsafes for a patient in her communications with her psychotherapist if she seeks treatment while in a custody dispute, regardless of what she claims in litigation.

In addition to impermissibly rewriting the statutory provision, these three cases rely on the faulty premise that there can be an "involuntary waiver" based on some "calamitous event." *Cf. Zarzaur*, 213 So. 3d at 1119. It is a proposition that finds no place in Florida jurisprudence. Simply put, waiver cannot be involuntary. "Waiver is the intentional relinquishment of a known right [] and may be express or implied. [It] may be inferred from conduct or acts putting one off his guard and leading him to believe that a right has been waived." *Thomas N. Carlton Estate, Inc. v. Keller*, 52 So. 2d 131, 133 (Fla. 1951) (cleaned up and internal quotations and citations omitted); *see also Davis v. Davis*, 123 So. 2d 377, 381 (Fla. 1st DCA 1960). Moreover, "[t]here can be no waiver without knowledge express or implied of that which is to be

waived." *Gulf Life Ins. Co. v. Green*, 80 So. 2d 321, 322 (Fla. 1955); *cf. Taylor v. Kenco Chem. & Mfg. Corp.*, 465 So. 2d 581, 587 (Fla. 1st DCA 1985) (distilling waiver down to three elements: "(1) the existence at the time of the waiver of a right . . . which may be waived; (2) the actual or constructive knowledge of the right; and (3) the intention to relinquish the right").

I categorically reject the idea that someone could "waive" the psychotherapist-patient privilege in a custody dispute simply by voluntarily seeking personal mental health care through a professional relationship protected as a substantive right established by the Legislature. It is for the Legislature, not the courts, to add this "waiver" as an exception to the privilege.

That said, citations to *Critchlow*, *Miraglia*, and *O'Neill* are not necessary to support denial of Ms. Vincent's petition in this case. She invokes this court's certiorari jurisdiction by asserting that the trial court erroneously ordered the production of privileged mental health records to her husband in the context of a custody dispute. *See Scully v. Shands Teaching Hosp. & Clinics, Inc.*, 128 So. 3d 986, 988 (Fla. 1st DCA 2014) ("Where, as here, an order permits discovery of medical or other records that are protected by constitutional or statutory privileges, this court has jurisdiction to review the order because the harm caused by the erroneous production of such records cannot be remedied on appeal."); *cf. Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 95 (Fla. 1995) (holding that irrelevant discovery does not necessarily equate with irreparable harm for certiorari jurisdictional purposes).

In this case, Mr. and Ms. Vincent are in the middle of a custody dispute regarding their young child. Evidence before the trial court indicated that Ms. Vincent suffers with mental health issues. At two separate hearings, Ms. Vincent called her mental health counselor to testify as to confidential conversations they had had and to speak to Ms. Vincent's mental stability. At one point, Ms. Vincent's counsel asked, "Is this woman stable or not stable?" The counselor responded, "In my opinion, she's very stable." Counsel then asked, "Do you have any problems at all with this woman being the primary caregiver for a two and a half year old and a six week old boy?" To this, the counselor stated, "No, sir, I do not." Counsel also asked the following: "And did you ever see

any indications of impairment for drugs or alcohol with [Ms. Vincent] in any of the times that you have seen her or talked to her?" The counselor answered, "No, sir, I have not."

While the custody litigation was still ongoing, Ms. Vincent voluntarily committed herself for in-patient psychiatric hospitalization, which lasted about five days. Mr. Vincent then sought disclosure of the records from that hospitalization. Ms. Vincent agreed that the trial court should conduct an in-camera review of all 416 pages, which the trial court did. The trial court ordered that the records be disclosed, and Ms. Vincent asks that we quash that order. The limited record before us does not support that relief.

At the hearing on this question, Ms. Vincent's counsel made the following argument to the trial court:

> We want you to have the records. I brought my own set for you of the records. We don't oppose the in camera ruling by the Court. The only thing that has to be done is there needs to be an order by you, because if there's an order that says - - and I think that's what the case law says. That an in camera review, and it's not just Zarzaur, my case that I lost, but it's as well as the Brooks case, but they're in camera.
>
> So we brought the same Baptist Hospital records, the 277 pages. We have intended all along for you to see them. Your order will protect her confidentiality so that she's not waiving. If I just handed it to the Court I'm afraid that would count as a waiver, so we did an order that says just that; that in light of Zarzaur and Brooks and what the evidence code says, that you're directing that the records be provided. They're under seal, they're available to the Court, and you reserve jurisdiction at some later point *if there are threshold requirements met by the husband, then in theory you could release them to them*. But that's some pretty high standards before you could do that. So that's the order that will accomplish that.

> We'll even go further. That's the 277 pages from Baptist *we want you to see*. You'll see how much of their emergency motion was not true. I'll get to that [sic] my opening.
>
> We have another 139 pages from Lakeview. Lakeview came and saw her while she was at Baptist for those five days, *so they've got great records*, lots of records. I brought that and I don't think the Baptist people will have those. Again, same rule and my proposed order covers both sets of records, so that it's directed by the Court, so it's not a waiver by her. Total of 401 [sic] pages.
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> *You'll be able to see those and know exactly what happened*, and see whether her father and today her telling the truth, she does not consume alcohol, has not consumed alcohol, do those tests say that she was clean, she was not taking any medications other than her prescribed medications.

(emphasis supplied).

Ms. Vincent went further, arguing that the trial court actually should consider the records as evidence as part of its custody determination. He stated the following:

> You have had, from the very beginning we've been focused on [sic] best interest of the child, best interest of the child, at every proceeding, pleadings and so forth, and you have those [sic] information. You reading those records, you're the trier of fact so you can make determinations including what you have learned from those records. *We are no longer suggesting that those records are shielded from your consideration to make a decision*.
>
> But the court system says if you've got enough to make best interest decisions, we also have the constitution, the statutes, the Supreme Court, over and over and over, the Brooks case that they cited, they've cited it five or six times, said go to in camera. In camera

> is to the court, let the court see the records *and weigh the records*.
>
> In this particular case you have enough, you will have enough to decide the best interest of the child. Let's get to final hearing, get this over with.

(emphasis supplied).

In this case, there is no reason to rely on cases that judicially redraft the privilege in section 90.503 to include a "calamitous event" or "involuntary waiver" exception. The record quoted above demonstrates that the *actual* text of the statutory privilege excludes the mental health records of Ms. Vincent's five-day self-commitment from its coverage because she affirmatively "relie[d] upon [her mental health] condition as an element of [] her claim or defense" in the child custody proceeding. § 90.503(4)(c), Fla. Evid. Code. She did this when she elicited testimony from her own counselor regarding her mental stability, her impairment, and her fitness to be a parent. At that point, Mr. Vincent would be entitled to access information that could rebut that testimony.

If Ms. Vincent instead means to argue that the trial court ordered the disclosure of more records than were relevant to her mental health condition within the context of the custody dispute, she either failed to preserve this argument or invited the error she claims. Her counsel told the trial court not only to review all of the records but also to consider them as evidence as it made its determination regarding custody. Moreover, at no point did Ms. Vincent identify particular pages of those records that should be excluded from production on relevance grounds. She essentially asked that the trial court consider all of the records from her five-day commitment in its role as factfinder, and counsel even intimated that the records were relevant because they would rebut allegations made by Mr. Vincent.

Ms. Vincent, then, conceded the relevancy of all 416 pages of the mental health records created during a relatively contemporaneous, voluntary commitment of short duration. She in turn gave up her right to contend that the disclosure of the records to Mr. Vincent—the opposing party in the litigation—violated any

privilege. *Cf. Scully*, 128 So. 3d at 988–89 (quashing production order because the "trial court did not limit the scope of the records [to be produced] to a period more temporally-related to the claims at issue in this case, nor did it require an in camera review to ensure that only relevant records are produced").

We use the common law writ of certiorari to obtain the record in a pending case "and evaluate the proceedings for regularity." *Broward County v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 842 (Fla. 2001). Serving as a "safety net," the writ gives us "the prerogative to reach down and halt a miscarriage of justice where no other remedy exists." *Id.* Certiorari "is an extraordinary remedy, not a second appeal," and we do not use it "to redress mere legal error." *Id.* For us to grant the writ, we must have before us the rare extreme case where the record itself reveals "an error so fundamental in character" that it threatens "to fatally infect the judgment and render it void," such that our immediate correction is required. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995) (emphasis omitted) (quoting with express approval *State v. Smith*, 118 So. 2d 792, 795 (Fla. 1st DCA 1960)). This is not that case, so I agree with denying the petition.

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